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Roland Webb v. R.O.A. General, Inc., William Reagan, Douglas T. Hall : Brief in Opposition to Certiorari

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROLAND WEBB, Plaintiff-Respondent, v. R.O.A. GENERAL, INC., a Utah corporation, WILLIAM REAGAN, individually, and DOUGLAS T. HALL, individually, Defendants-Petitioners.	Supreme Court No. 890234 Category 13

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Roland Webb ("Webb") respectfully submits this brief in opposition to the Petition for Writ of Certiorari filed by R.O.A. General, Inc. ("R.O.A."), William Reagan ("Reagan") and Douglas T. Hall ("Hall") (collectively "Petitioners").

ISSUES PRESENTED FOR REVIEW

Petitioners have assigned error to the Utah Court of Appeals' decision reported in Webb v. R.O.A. General, Inc., 106 Utah Adv. Rep. 47 (Utah Ct. App. 1989), a copy of which opinion is attached hereto as Appendix A-1 through A-6.

Only the four specific questions presented for review in petitioner's brief pursuant to Rule 46 of the Utah Supreme Court Rules are before this Court. The issues of reasonable time and proper purpose, which are argued in the body of Petitioners'

brief, are not presented as questions for review under Rule 46 and therefore, are not properly before this Court.

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. § 16-10-47(b)-(c) (1986):

> (b) Any person who is a shareholder of record, upon written demand stating the purpose thereof, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records of account, minutes and record of shareholders and to make extracts therefrom. A proper purpose means a purpose reasonably related to the person's interest as a shareholder.
>
> (c) Any officer or agent who, or a corporation which, shall refuse to allow any such shareholder, or his agent or attorney, so to examine and make extracts from its books and records of account, minutes, and record of shareholders, for any proper purpose, shall be liable to such shareholder in a penalty of 10% of the value of the shares owned by such shareholder, in addition to any other damages or remedy afforded him by law; but no such penalty shall exceed $5,000. It shall be a defense to any action for penalties under this section that the person suing therefor has within two years sold or offered for sale any list of shareholders of such corporation or any other corporation or has aided or abetted any person in procuring any list of shareholders for any such purpose, or has improperly used any information secured through any prior examination of the books and records of account, or minutes, or record of shareholders of such corporation or any other corporation, or was not acting in good faith or for a proper purpose in making his demand. (emphasis added).

Utah Code Ann. § 16-10-2(15) (1986):

> (15) "Shareholder" means one who is a holder of record of shares in a corporation.

STATEMENT OF THE CASE

Nature of the Case

This action was originally brought by Webb to compel R.O.A. and Reagan to allow Webb to conduct a shareholder

examination of the books and records of account of R.O.A. pursuant to Utah Code Ann. § 16-10-47(b) and to recover the statutory penalties imposed under § 16-10-47(c) for each refusal by R.O.A., Reagan and Hall to allow such examination.

Course of Proceedings

The Third Judicial District Court, on cross-motions for partial summary judgment, ruled that Webb had no inspection rights because he had ceased being a shareholder within the meaning of the statute. The Utah Court of Appeals reversed the district court's ruling and remanded the case to the district court directing it to (i) grant summary judgment in favor of Webb, (ii) grant injunctive relief requiring R.O.A. to permit Webb's requested shareholder inspection, (iii) impose separate statutory penalties against each of the Petitioners for each separate refusal to allow Webb's shareholder inspection and (iv) determine and award any additional damages suffered by Webb as a result of each of Petitioners' refusals to allow Webb's shareholder inspection.

Statement of Facts

By written agreement dated July 7, 1981 (the "Agreement"), Webb and Reagan formed R.O.A., a Utah corporation. (R. at 62-78, 483-484). Reagan obtained 80% of the stock of R.O.A. and Webb and his wife acquired the remaining 20% stock interest. (R. at 34, 203, 274).

The July 7, 1981 Agreement provided, among other things, that R.O.A. had an option to purchase the Webb's stock at

a price to be determined by independent appraisals. (R. at 62-78). By letter dated January 27, 1987, R.O.A. gave notice of its exercise of its option. (R. at 43, 78A, 207, 280, 484, 508). On April 20, 1987, Webb notified R.O.A. and Reagan that he was exercising his right pursuant to Utah Code Ann. § 16-10-47(b) to examine the books and records of R.O.A. to determine its financial condition and to verify the accuracy of its books and records prior to submitting it to an independent appraisal. (R. at 53, 485).

On or about May 5, 1987, Norman Clark, Vice-President of Administration and Finance of R.O.A., informed Webb that Reagan would be out of the country until May 18, 1987, and insisted that Webb defer his examination until May 18, 1987. (R. at 54, 485). On May 18, 1987, Webb renewed in writing his request to examine the books and records of R.O.A. (R. at 55-56, 485, 514). By letter dated May 20, 1987, Webb's counsel notified Reagan that Webb's accountants would begin their examination at 10:00 a.m. on Wednesday, May 27, 1987, a regular business day, at R.O.A.'s corporate offices in Salt Lake City. (R. at 57, 93, 485).

Webb's agents, certified public accountants with the accounting firm of Peat Marwick Main & Co., and Webb's counsel, Victoria E. Brieant, Esq., arrived at the offices of R.O.A. at 10:00 a.m. on Wednesday, May 27, 1987, to begin their inspection of R.O.A.'s books and records. (R. at 93, 485-486). William H. Adams ("Adams"), corporate counsel for R.O.A., and Reagan refused

to permit either Webb's counsel or Webb's accountants to inspect the books and records of R.O.A. that day. R.O.A.'s, Reagan's and Adams' refusal to permit Webb's inspection was confirmed by letter dated May 26, 1987, from Adams. (R. at 58, 94).

On June 3, 1987, Webb repeated his demand to examine the books and records of R.O.A. Webb designated 10:00 a.m. on Friday, June 5, 1987, a regular business day, at R.O.A.'s corporate offices in Salt Lake City as the time and place for the examination. (R. at 59-60, 94, 485). On June 4, 1987, Webb's counsel telephoned Adams to determine whether R.O.A. would permit Webb to proceed with the examination. (R. at 95, 485-486). Adams told Webb's counsel that Reagan and R.O.A. refused to allow the examination because it would allegedly disrupt its business and because there were no employees available to locate the company's files. (R. at 95).

At 5:00 p.m. on June 4, 1987, Adams caused to be delivered to counsel for Webb a letter dated June 4, 1987, in which Adams stated that R.O.A. would not allow Webb, his agents or attorneys to examine the books and records of R.O.A. until June 15, 1987. (R. at 61, 95-96).

On June 15, 1987, the examination date specified by Adams, Webb's counsel and certified public accountants from Peat Marwick Main & Co. retained by Webb arrived at the corporate offices of R.O.A. at 9:00 a.m. to begin the examination. (R. at 96). Hall and Reagan informed Webb's counsel for the first time that it was their position that Webb was no longer a shareholder of R.O.A.

because R.O.A. had exercised its option to purchase Webb's shares and refused the inspection. (R. at 96).

SUMMARY OF ARGUMENTS

POINT I: The Utah Court of Appeals did not err in holding that a shareholder of record of a Utah corporation has a statutory right to examine the corporation's books and records until he ceases to be a shareholder of record. A shareholder does not cease to be a shareholder of record until his shares are paid for and his stock is endorsed and transferred on the books and records of the corporation. Consequently, R.O.A.'s mere notice to Webb of its exercise of an option to purchase his R.O.A. stock did not terminate Webb's shareholder status or extinguish his statutory right of examination.

POINT II: The Utah Court of Appeals did not err in holding that Webb did not waive his statutory right of inspection in view of Section 16 of the Agreement which states, "The Stockholders shall retain all their rights as stockholders of the Corporation, except those specifically modified by this Agreement." The Agreement contains no express or implied waiver by Webb of his statutory right of inspection.

POINT III: As stated at the beginning of this brief, the Court of Appeals' conclusion that as a matter of law Webb's stated purpose for examining R.O.A.'s books and records is a "proper purpose" within the meaning of Utah Code Ann. § 16-10-47(b), has not been properly brought before this Court. Nonetheless, determining the value of Webb's stock, ascertaining

the propriety of certain business conducted by the R.O.A.'s officers and ascertaining the accuracy and integrity of the corporation's recordkeeping are, as a matter of law, proper purposes for Webb's examination of R.O.A.'s books and records.

POINT IV: The Court of Appeals correctly concluded, as a matter of law, that Webb's request to examine R.O.A.'s books and records during R.O.A.'s normal business hours was a request to examine such books and records at a "reasonable time" within the meaning of Utah Code Ann. § 16-10-47(b).

POINT V: The Court of Appeals did not err in holding that Utah Code Ann. § 16-10-47(c) imposes against each corporation and each of its officers and agents who violates Utah Code Ann. § 16-10-47(b), a separate penalty for each separate violation, equal to 10% of the value of the shares owned by the shareholder (but not to exceed $5,000), in addition to other damages or remedies afforded by law. The Court of Appeals correctly observed that the undisputed record on appeal shows that R.O.A., on three occasions, and Reagan, on two occasions, each violated Webb's shareholder examination rights. Consequently, the statutory penalties ordered by the Court of Appeals to be assessed against each of them are proper as a matter of law.

ARGUMENTS

POINT I.

WEBB IS A SHAREHOLDER OF R.O.A. AND HAS A STATUTORY RIGHT TO INSPECT THE BOOKS AND RECORDS OF R.O.A.

The pivotal question before the District Court and the Court of Appeals was whether Webb ceased to be a shareholder of R.O.A. by virtue of R.O.A.'s mere notice of the exercise of its option to purchase Webb's R.O.A. stock. Utah Code Ann. § 16-10-47(b)(1986) provides that the right to inspect the books and records of a corporation is available to "any person who is a shareholder of record." Utah Code Ann. § 16-10-2(15) defines "shareholder" as "one who is a holder of record of shares in a corporation." (emphasis added). The Utah Supreme Court observed in Goddard v. General Reduction & Chemical Co., 57 Utah 180, 193 P. 1103 (1920), that the "absolute right of inspection is limited . . . to those to whom the stock has been transferred on the books of the company." See also Holmes v. Bishop, 75 Utah 419, 285 P. 1011, 1012 (1930) ("One who regularly is a stockholder of record is presumed to be a bona fide stockholder.").

The undisputed record in this case demonstrates that (i) Webb has at all times continued to be identified on the books of R.O.A. as a shareholder of record of R.O.A. (R. at 178-181); (ii) R.O.A. has tendered no consideration whatsoever to Webb for his stock; (iii) Webb has never endorsed his stock for transfer;

and (iv) Webb has not delivered his stock to R.O.A. or any other purchaser. (R. at 484).

Petitioners have failed to distinguish any of the authorities cited by the Court of Appeals, all of which hold that the mere exercise of an option to purchase a shareholder's stock does not deprive the shareholder of his shareholder status and statutory right of inspection. Every court that has confronted this issue has held that a shareholder retains his statutory rights as a shareholder, despite being bound by contract to sell his shares to a third party, until the shares are paid for and transferred on the books of the corporation--in other words, as long as the contract remains executory. See 12A Fletcher Cyc. Corp. §§ 2230, 5613 (rev. perm. ed. 1986).

In Estate of Bishop v. Antilles Enterprises, Inc., 252 F.2d 498 (3rd Cir. 1958), the shareholders of the respondent corporation entered into a cross-purchase agreement which provided that upon the death of shareholder Cory Bishop, the surviving shareholders had the option to purchase his shares from his estate at book value. Following Bishop's death, Vose, one of the surviving shareholders, asserted his right to purchase Bishop's stock from his estate, claiming the stock was worthless and tendering $1.00 in payment. The administratrix of Bishop's estate argued successfully before the district court that the estate was entitled, as a shareholder, to examine the corporation's books and records after the option was exercised.

On appeal, the respondent corporation contended that "by virtue of the agreement between the stockholders, title to and ownership of Bishop's stock had passed to Vose immediately upon the election of the latter to purchase it." Id. (footnote omitted). The Court of Appeals rejected this argument and held that even though an option had been exercised to purchase the stock, which exercise "vested in Vose the right to have the stock transferred to him upon payment of the purchase price, it did not divest the petitioner . . . of legal title to the shares or of the rights of a stockholder." Id. Moreover, the court concluded that even assuming the agreement to sell the stock was valid and binding,

> the petitioner's right . . . to have access to the books and records of the corporation certainly will continue at least until after the proper amount of the purchase price has been authoritatively determined and has been paid. Until then it is obvious that the petitioner has a very real interest in securing accurate information as to the state of the respondent corporation's accounts. Id.

In Knaebel v. Heiner, 673 P.2d 885 (Alaska 1983), the Alaska Supreme Court rejected the very argument asserted by Petitioners. Jeffrey Knaebel, a shareholder of Resource Associates of Alaska, Inc. ("RAA"), had entered into an agreement with RAA and the other two major shareholders of RAA to exchange his RAA stock for the stock of RAA's wholly owned subsidiary. Id. at 885-86. Heiner, RAA's records officer, refused Knaebel's written demand for inspection of the books and records of RAA pursuant to Alaska Stat. § 10.05.240, based on the argument "that

if there was a valid contract for the exchange of stock in effect, which called for performance prior to the date of Knaebel's demand for inspection, Knaebel could have no right of inspection after that date." Id. at 886.

The Alaska Supreme Court reversed the trial court's ruling in favor of RAA, holding that although the exchange agreement did not specify the manner of the "exchange" of the stock, "some form of physical tender was contemplated, and . . . unless and until the exchange occurred, the agreement, at least on this point, . . . was executory." Id. at 887 (footnotes omitted). The court concluded that there was no basis for the argument "that the agreement by itself effectively cancelled Knaebel's shareholder of record status as of October 15, 1980, any more than a land sale contract which specifies a date for closing cancels a recorded deed on the specified date." Id. The court held that Knaebel, who, due to the executory status of the exchange agreement continued to be a shareholder of record, was therefore entitled by law to examine RAA's books and records. Id. at 888. See Shelters, Inc. v. Mankin, 130 Ga. App. 859, 204 S.E.2d 810, 811 (1974) (shareholder's execution of a contract with a third person for the sale of his stock, did not deprive the shareholder of his statutory inspection rights); Hoover v. Fox Rig & Lumber Co., 199 Okla. 672, 189 P.2d 929, 930 (1948) (corporation's exercise of its right of first refusal did not terminate shareholder's statutory inspection privileges).

Summarizing the opinions of the courts that have addressed the precise issue presented in the instant case, the authors of Fletcher Cyclopedia of the Law of Private Corporations ("Fletcher Cyclopedia of Corporations") wrote:

> [S]tockholders are not precluded from inspecting corporate books and records by reason of an executed contract for the sale of their stock in the corporation. Whether a contract to sell or exchange shares is deemed ultimately to be fully executed or executory at the time the shareholders demand inspection and whether the shareholders' names were ever removed from the books determines status, and hence whether the shareholders have a right of inspection pursuant to shareholder-of-record statutes.

Fletcher Cyc. Corp. § 2230 (rev. perm. ed.) (footnotes omitted).

Respondents R.O.A. and Reagan have cited no cases, nor are there any cases, supporting their argument that Webb is not a shareholder of record. In support of their assignment of error to the Utah Court of Appeals, Petitioners continue to rely upon shareholder examination cases that are patently distinguishable from the instant case. The shareholder in each of those cases had either (i) received payment for his shares and was subject to an action for specific performance, Dierking v. Associated Book Service, Inc., 31 Misc. 2d 995, 222 N.Y.S.2d 729 (N.Y. Sup. Ct. 1960); (ii) endorsed his shares and delivered them to an escrow agent pending full payment of the price, Nash v. Gay Apparel Corp., 11 Misc. 2d 768, 175 N.Y.S.2d 938, 939 (N.Y. Sup. Ct. 1958); (iii) sold and transferred the shares, although he attempted to retain a post-sale right of inspection, Rosenberg v. Steinberg-Kass, Inc., 18 Misc. 2d 880, 190 N.Y.S.2d 135, 136

(N.Y. Sup. Ct. 1959); or (iv) entered into a binding purchase/sale agreement with the purchasing corporation providing for installment payments secured by a chattel mortgage on the corporation's personalty, Tracy v. Perkins-Tracy Printing Co., 278 Minn. 159, 153 N.W.2d 241, 243 (1967).

Petitioners place particular emphasis on the decision in In re Gaines, 4 Misc. 2d 935, 180 N.Y.S. 191 (1919), aff'd 190 App. Div. 941, 179 N.Y.S. 922 (1920), which they erroneously claim was based on facts similar to those in the instant case. In contrast to the instant case, the shareholder who was denied the right of inspection in Gaines, had already endorsed his stock certificates and delivered them to an escrow agent to whom payment for the shares had also been tendered by the company. The Gaines court concluded that "the action of petitioner in indorsing the stock in blank and delivering the same to the Banker's Trust Company in itself divested petitioner of title." Id. at 192 (emphasis added).

Moreover, Petitioners reliance on Taylor v. Daynes, 118 Utah 2d 72, 218 P.2d 1069 (1950), to support their argument is misplaced, because the stock purchase contract in that case was held to be "not executory, but a contract of a present purchase and sale." Id. at 1072. In further contrast to the instant case, the stock certificates in Taylor had already been delivered and accepted once. Id.

Applying the very standards and reasoning of the cases cited by Petitioners, the purchase of Webb's stock has never been

completed. The option agreement between Webb and R.O.A., by its terms, contemplates a consummated sale only after the stock has been appraised, payment of the purchase price has been tendered and the stock has been endorsed and transferred.

Petitioners' contention that "payment is irrelevant" to the issue of Webb's shareholder status (Petitioners' Brief at 9) is not supported by the authorities Petitioners cite in their brief. Petitioners cite Fletcher Cyclopedia of the Law of Corporations § 5628 for the proposition that "passing of title is not predicated upon payment of the purchase price." Petitioners' Brief at 9-10. A footnote reference ignored by Petitioners to the language they quote in their brief, however, clarifies that full payment of the purchase price under an installment note is not necessary to the passing of title. 12A Fletcher Cyc. Corp. § 5628 n.14 (rev. perm. ed. 1984)(referring reader to § 5613). Fletcher further explains at § 5613:

> If the contract indicates that it is the intent of the parties that title to the stock and the rights of a stockholder shall not pass until some future time, it is construed to be an executory contract for the purchase and sale of the stock. So if by the terms of the contract the buyer is bound to do anything as a consideration, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition is fulfilled, even though the certificate may be delivered. (emphasis added).

In the instant case, payment for and delivery of the stock are concurrent conditions to the passing of title, neither of which conditions has been satisfied. The decisions of Tracy v. Perkins-Tracy Printing Co., 278 Minn. 159, 153 N.W.2d 241

(1967) and Currey v. Willard Stream Service, 321 P.2d 680 (Okla. 1958), cited in Petitioners' brief, are distinguishable in that each case involved a stock purchaser's failure to make payments under an installment obligation and stand solely for the proposition that full payment under an installment contract is not required to pass title.

Petitioners have not fairly or accurately summarized Fletcher Cyclopedia of the Law of Private Corporations cited in support of their contention that actual delivery of Webb's stock certificate is not necessary to pass title to R.O.A. Petitioners' Brief at 10. Fletcher plainly states that when a stock purchase has been fully completed, title and rights to the stock are not necessarily determined by possession of the certificates. 11 Fletcher Cyc. Corp. § 5094 (rev. perm. ed. 1986). The decisions of the Utah Supreme Court in Owyhee, Inc. v. Robbins Marco Polo, 17 Utah 2d 181, 407 P.2d 565 (1965), and Davies v. Semloh Hotel, 86 Utah 2d 318, 44 P.2d 689 (1935), cited by Petitioners, reach the same conclusion.

Based on (i) the statutory definition of a "shareholder," (ii) the undisputed fact that Webb continues to be, by definition and as a matter of undisputed fact, a "shareholder of record" on the books of R.O.A. and has never received payment for, endorsed or transferred his R.O.A. stock, and (iii) a line of unanimous decisions upholding shareholders' rights of inspection until the stock is paid for or the sale of the stock is otherwise contractually complete, the opinion of the

Court of Appeals is correct and the petition for writ of certiorari should be denied.

POINT II.

WEBB DID NOT CONTRACT AWAY HIS STATUTORY RIGHT TO INSPECT THE BOOKS AND RECORDS OF R.O.A.

Petitioners contended for the first time on appeal that Webb somehow waived his rights as a shareholder of record under § 16-10-47(b) by agreeing, in 1981, to submit to an independent appraisal to determine the value of his stock if and when the stock was ever sold. This argument contradicts Section 16 of the Agreement which expressly provides: "The Stockholders shall retain all their rights as stockholders of the Corporation, except those specifically modified by this Agreement." (R. at 75). The Agreement contains no express or implied waiver by Webb of his statutory right of inspection. Moreover, this argument is inconsistent with the position R.O.A. took in 1985 when it permitted Webb to conduct a shareholder inspection.

POINT III.

WEBB'S DEMANDS FOR INSPECTION WERE FOR A PROPER PURPOSE.

As a matter of law, once a shareholder has alleged a proper purpose, it is the duty of the corporation to put forth specific facts demonstrating an improper purpose. Goddard v. General Reduction & Chemical Co., 57 Utah 180, 193 P. 1103, 1107 (1920). The Utah Court of Appeals correctly observed that aside from conclusory accusations of harassment and bad faith, there is nothing in the record showing that Petitioners have introduced

evidence of an improper purpose for Webb's examination. Appendix at A-5. In Holmes v. Bishop, the Utah Supreme Court summarized:

> In the answer it also was alleged that the plaintiff sought the inspection "For the purpose of harassing and annoying the defendants as officers of the said Intermountain Mortuary Company and to hinder them in the performance of their duties as such and to bring them and the said company into disrepute with the stockholders of said company and with the public." All that is a mere conclusion without any alleged facts to support it.

75 Utah 419, 285 P. 1011, 1014 (1930).

Petitioners' contention that Webb may not inspect R.O.A.'s books and records because he conducted an inspection more than two years prior to his demand on April 20, 1987, is unavailing. See Petitioners' Brief at 14. There is no statutory or case law requirement that a shareholder wait more than two years between inspections. The Utah Supreme Court observed in Holmes v. Bishop, 75 Utah 419, 285 P. 1011, 1014 (1930), "that the plaintiff had been given the privilege of an inspection in December, 1928, and on several occasions thereafter, did not justify the defendants in refusing a further inspection in February, 1929." Prior access to books and records as a director of R.O.A. is also irrelevant in determining whether Webb's present demand was for a proper purpose. Neither the statute nor any case law treats a director/shareholder differently than other shareholders.

Petitioners' contention that Webb's failure to inspect R.O.A.'s records prior to R.O.A.'s exercise of the option "suggests strongly that [Webb's] demands are meant solely to vex

and harass the defendants" is preposterous. Petitioners' Brief at 14-15. In Estate of Bishop v. Antilles Enterprises, Inc., 252 F.2d 498, 499 (3rd Cir. 1958) the court emphasized that until the shares are paid for, the shareholder "has a very real interest in securing accurate information as to the state of the . . . corporation's accounts." Finally, each of the cases cited by Petitioners in support of their "delay" argument involved the equitable defense of laches, which defense has never been pleaded by Petitioners; these cases are simply off target. See eg. Foss v. Peoples Gas Light and Coal Co., 241 Ill. 238, 89 N.E. 351 (1909)(shareholder had known about mismanagement for almost 48 years); Skouras v. Admiralty Enterprises, Inc., 386 A.2d 674, 682 (Del. Ch. 1978)(former director waited ten years to remedy mismanagement).

Petitioners' repeated attempts throughout this litigation to characterize Webb's statutory right of inspection as duplicative of his right to have an independent valuation of his stock demonstrates, at the very least, Petitioners' misunderstanding of one or both of these processes. The broad inspection rights granted by the Utah Legislature do not serve the same purpose as appraisal rights. The sole purpose of the appraisal is to value Webb's stock. Independent appraisers will not investigate, on Webb's behalf, any impropriety or irregularity with respect to business transacted, or the integrity of R.O.A.'s recordkeeping and accounting practices. Webb must be able to exercise his statutory inspection right to

verify that the valuation of his stock will be based on honest and accurate information.

Petitioners' statements that Webb has refused to sign a confidentiality agreement and that Webb has previously usurped a corporate opportunity (Petitioners' Brief at 16) have no factual foundation in the record whatsoever. The record demonstrates that Petitioners have failed to introduce any evidence supporting these claims in the proceedings below.

POINT IV.

WEBB'S REQUESTS FOR INSPECTION WERE FOR A REASONABLE TIME.

The first time Webb sought to inspect R.O.A.'s books and records, Webb gave R.O.A. more than a month's written notice and requested that the inspection occur during regular business hours on the premises of R.O.A. Webb honored R.O.A.'s demands that the requested examination be postponed until Reagan, president of R.O.A., returned from an overseas trip. The second request was also for regular business hours on the premises of R.O.A. The second request was denied. In his third request, Webb permitted Petitioners to choose the time and place and was requested by R.O.A. to appear on a specific date at a specific time. Upon arriving at R.O.A.'s corporate offices at the appointed time, Webb was again refused access. All of these facts are undisputed by Petitioners. The Court of Appeals accurately described Petitioners' refusals as "repeated stall tactics, first leading Webb to believe inspection would be

granted, then refusing access to the books at the agreed-upon time for specious, fluid reasons." Appendix A-5.

POINT V.

WEBB IS ENTITLED TO THE AWARD OF SEPARATE STATUTORY PENALTIES AND OTHER DAMAGES.

The primary purpose of shareholder inspection legislation is to prescribe penalties so that corporations and officers will be less likely to refuse access and "delay inspection until the right was actually litigated." ABA-ALI Model Bus. Corp. Act Ann. § 52, ¶ 2 (2d ed. 1971) (emphasis added). The penalty provisions of the statute must serve as a viable deterrent to corporations and their officers. The Utah Court of Appeals correctly reasoned that to permit violating parties to escape with a single penalty regardless of how many times and for how long they refuse to permit inspection effectively allows the corporation to purchase multiple and serial exemptions from the law for a one-time fee. In the case of minority shareholders, a single 10% penalty would normally be a very small price to pay to silence opposition.

Meyer v. Ford Industries, Inc., 272 Or. 531, 538 P.2d 353 (1975), cited by Petitioners, authorizes multiple penalties for multiple refusals. The well-known principle asserted by Petitioners, that penal statutes should be strictly interpreted, applies only when the statute is subject to different reasonable interpretations. The strict construction of the statutory penalty for refusing a shareholder examination would render it

meaningless. Naquin v. Air Engineered Systems & Services, Inc., 423 So. 2d 713, 716-17 (La. 1983). Given the undisputed fact that three separate refusals occurred, the statute demands that three separate penalties be imposed.

CONCLUSION

The literal application of Utah Code Ann. § 16-10-47(b) and the authorities cited by the Utah Court of Appeals, all of which are directly on point, compel the conclusion that the Court of Appeals was correct in ruling that Webb's status and rights as a shareholder were not extinguished by R.O.A.'s mere giving notice of exercise of option to purchase his stock and that separate penalties for each separate refusal to allow inspection should be imposed. There are no cases supporting Petitioners' arguments to the contrary.

Webb respectfully requests the Utah Supreme Court to deny the Petition for Writ of Certiorari and affirm the Court of Appeals ruling.

Respectfully submitted this 12th day of July, 1989.

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3. On the contrary, the "strict construction" rule that is employed in connection with insurance policies accomplishes just the opposite result. Any ambiguity concerning the scope of insurance is construed in favor of coverage. *See, e.g., Fuller v. Director of Finance*, 694 P.2d 1045, 1047 (Utah 1985) ("An insured is entitled to the broadest protection he could have reasonably understood to be provided by the policy."); *Williams v. First Colony Life Ins. Co.*, 593 P.2d 534, 536 (Utah 1979) (ambiguity in insurance contract must be construed in favor of insured); *Dienes v. Safeco Life Ins. Co.*, 21 Utah 2d 147, 442 P.2d 468, 471 (1968) (no ambiguous statement may be enforced against an insured). *See also Colard v. American Family Mut. Ins. Co.*, 709 P.2d 11, 14 (Colo. App. 1985) (if an insurance company intends to exclude from coverage damage resulting from the insured's own negligence, it must do so clearly and unambiguously); *American Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 729 P.2d 1352, 1354 (Nev. 1986) (insurance contracts are construed to accomplish the object of providing indemnity to the insured); *Weldon v. Commercial Union Assurance Co.*, 103 N.M. 522, 710 P.2d 89, 91 (1985) ("When an ambiguity exists, the court must construe the policy so as to sustain indemnity.").

4. Under different facts, the lack of explicit language clearly indicating an intent to provide coverage for the insured's own negligence may leave open the question of whether such coverage was intended. However, such ambiguity would be resolved through the ordinary rules of contract interpretation rather than by invoking the strict construction rule. *See generally Wilburn v. Interstate Electric*, 748 P.2d 582, 585-86 (Utah Ct. App. 1988).

5. We do not suggest that the presence of other insurance is irrelevant in such cases. In an action for breach of a contract to provide insurance, the measure of general damages is typically the amount the policy would have paid had it been obtained. *See, e.g., PPG Indust. v. Continental Heller Corp.*, 124 Ariz. 216, 603 P.2d 108, 113-114 (1979). That amount could readily be affected by the existence of two or more policies (including policies of insurance which should have been obtained as contractually required) providing coverage for the same loss. *See, e.g.*, Utah Code Ann. §31A-21-307(2) (1986).

Cite as
106 Utah Adv. Rep. 47

IN THE UTAH COURT OF APPEALS

Roland WEBB,
Plaintiff and Appellant,
v.
R.O.A. GENERAL, INC., a Utah corporation; William Reagan, individually; William Adams, individually; and Douglas T. Hall, individually,
Defendants and Respondents.

No. 880197-CA
FILED: April 11, 1989

Third District, Salt Lake County
Honorable James S. Sawaya

ATTORNEYS:

Carol Goodman, Val J. Christensen, Alan E. Barber,

Ross C. Anderson, Salt Lake City, for Appellant

Philip R. Fishler, Dennis M. Astill, Salt Lake City, for Respondent William Reagan;

Douglas T. Hall, Salt Lake City, for Respondent R.O.A. General, Inc.

Before Judges Billings, Jackson, and Orme.

OPINION

JACKSON, Judge:

Roland Webb filed this action against R.O.A. General, Inc. ("R.O.A."), a Utah corporation, and William Reagan, its majority shareholder, and others, in part to enforce his claimed right to examine R.O.A.'s corporate books and records pursuant to Utah Code Ann. §16-10-47(b) (1987), a section of the Utah Business Corporation Act (the "Act"). He also sought the imposition of penalties under Utah Code Ann. §16-10-47(c) (1987) for respondents' refusals to permit such an examination. The trial court, on cross-motions for partial summary judgment on these claims, ruled Webb had no inspection rights because he had ceased being a shareholder of record within the meaning of the statute. We reverse.

Webb and Reagan formed R.O.A. by written agreement dated July 7, 1981. Reagan received eighty percent of the stock and Webb the remaining twenty percent. Reagan remains the controlling shareholder and corporate president. The incorporation agreement gives R.O.A. an option to purchase Webb's shares, but the option provisions do not fix a purchase price. Instead, after the option is exercised, the parties are to engage in an alternating appraisal process to arrive at a price, begin-

ning with an appraiser selected by the seller. The final pricing step is that "any appraisal agreed to by two of the three appraisers shall be binding on the parties hereto absent fraud." No time frame or deadline is specified for the appraisal process. When this process yields a purchase price, the agreement provides alternative payment terms: (1) in cash; (2) 120 equal monthly payments with interest; or (3) such other terms as may be agreed to by the parties. The agreement contains no provision or time frame for delivery of the stock.

Reagan served Webb with a notice of R.O.A.'s exercise of its option dated January 27, 1987. The notice did not identify any price, select any terms of payment, or propose any time frame for the stock conveyance. Reagan's notice invited Webb to meet with him at Webb's earliest convenience "to discuss information which I have concerning the value of the R.O.A. General, Inc. stock" and other aspects of the transaction.

According to the facts set forth by Webb in affidavits filed in support of his motion for partial summary judgment, Webb pledged his stock in March 1987, at R.O.A.'s request, to secure a bank loan to R.O.A. On April 20, 1987, Webb submitted to R.O.A. a written request to examine the corporate books and records pursuant to section 16-10-47 in order to protect his interests as a shareholder and determine R.O.A.'s actual financial condition. R.O.A.'s vice president of administration and finance responded in a letter dated May 5, 1987, suggesting that Webb (1) postpone the inspection a few weeks because of the departure of a key employee in the accounting department, (2) specify which records were to be examined, and (3) wait a few weeks until Reagan returned to town. Webb, through one of his accountants, then sent an itemized list of the specific records and documents he wanted to examine.

On May 20, 1987, Webb's counsel sent a letter notifying R.O.A. of the appraiser selected and of Webb's intent to proceed with the inspection of the corporate records on May 27, 1987, a normal business day, beginning at 10:00 a.m. On May 26, R.O.A.'s counsel, William Adams, delivered to the offices of Webb's counsel a letter stating that the books would be made available for inspection when the selected appraiser, not other accountants, wanted to examine them. Webb's counsel and accountants proceeded to R.O.A.'s corporate offices on May 27, as planned, but were refused access to the books and records by Adams, after consultation with Reagan.

On May 29, Webb commenced this lawsuit. On June 3, 1987, his counsel submitted to R.O.A. another written notice of Webb's intent to have his accountants inspect the corporate records, this time on June 5, 1987. Webb's counsel was informed by Adams on June 4 that the inspection would not be allowed by R.O.A. because it would disrupt business and there was no staff person available to find the company's files. This refusal was confirmed in a letter from Adams that afternoon stating that R.O.A. staff would be available one-half day each day for the week commencing June 15, 1987.

Webb's counsel and accountants appeared at R.O.A. offices at 9:00 a.m. on June 15, but were again refused access to the books and records by Reagan and Hall, another R.O.A. attorney, who asserted for the first time that Webb had no inspection right because of R.O.A.'s January 1987 notice of its exercise of the stock purchase option.

Webb then amended his complaint to add allegations about the two June refusals. In his second cause of action, he requested recovery of a statutory penalty under section 16-10-47(c) against R.O.A., and against Reagan and Adams separately for each of the three refusals of inspection. He also sought injunctive relief to enforce his inspection rights under section 16-10-47(b). His ensuing motion for partial summary judgment on this cause of action was filed only against R.O.A. and Reagan, although he specifically reserved the right to proceed subsequently against Adams and Hall.

In their cross-motion for partial summary judgment, R.O.A. and Reagan argued Webb's statutory right to examine the corporate books terminated as a matter of law when R.O.A. gave notice of exercise of its option to purchase his stock, even though he was still shown on the corporate books as a holder of twenty percent of the stock and had neither endorsed, delivered, or received payment for his shares. They also filed the affidavits of Reagan and R.O.A.'s vice president in opposition to Webb's motion, purporting to create material issues of fact about the reasonableness of their refusal of his inspection requests, even if he retained his inspection rights under the statute. The affiants, however, did not deny the facts asserted in Webb's supporting affidavits, including the fact that Webb had been refused access to the books and records on May 27, June 4, and June 15. They merely claimed that Webb had been provided monthly financial statements and access to the corporate records prior to July 1986 and asserted that his requests were not reasonable, citing several excuses for the refusals, such as lack of key personnel and disruption of the business. They also argued that Webb's requests were vexatious and went beyond the information he really needed. In his affidavit, Reagan accused Webb of making the requests in bad faith to harass the corporation. No facts were asserted to support these conclusory claims or to dispute the purpose asserted by Webb, i.e., to protect his interests as minority shareholder and determine the true financial condition of the corporation. Affiant Reagan did dispute

Webb's assertion that his stock was worth more than $50,000, contending that, even if there was a refusal of Webb's lawful inspection demand, the statutory penalty could not be calculated until the value of Webb's shares was determined according to the terms of their agreement.

The trial court agreed with the respondents and held that Webb's inspection right and his status as a shareholder of record under section 16-10-47(b) terminated when R.O.A. exercised its purchase option. That ruling presents a narrow legal issue of first impression in Utah.

Section 16-10-47(b) provides:

> Any person who is a shareholder[1] of record, upon written demand stating the purpose thereof, shall have the right to examine, in person, or by agent or attorney, at any reasonable time or times, for any proper purpose, its books and records of account, minutes and record of shareholders and to make extracts therefrom. A proper purpose means a purpose reasonably related to the person's interest as a shareholder.

On appeal, we review the trial court's conclusions of law for correctness, with no particular deference to the trial court. *Creer v. Valley Bank & Trust*, 97 Utah Adv. Rep. 12 (1988); *Western Kane County Special Serv. Dist. No. 1 v. Jackson Cattle Co.*, 744 P.2d 1376, 1378 (Utah 1987). That same lack of deference applies to the trial court's interpretation of an unambiguous, integrated contract, *Zion's First Nat'l Bank v. National Am. Title & Ins. Co.*, 749 P.2d 651, 653 (Utah 1988), and to its interpretation of statutes, *Bonham v. Morgan*, 102 Utah Adv. Rep. 8, 9 (1989); *Asay v. Watkins*, 751 P.2d 1135 (Utah 1988), both of which present questions of law.

The issue central to this appeal is the nature of the contract the parties intended to create at the time of the exercise of R.O.A.'s purchase option. *See Taylor v. Daynes*, 118 Utah 61, 218 P.2d 1069, 1072 (1950); *Jones v. Commercial Inv. Trust*, 64 Utah 151, 228 P. 896, 900 (1924). That intent must be determined as a matter of law from the nature and text of the entire written agreement itself, if possible. *Buehner Block Co. v. UWC Assocs.*, 752 P.2d 892, 895 (Utah 1988); accord 12A *Fletcher Cyc. Corp.* §5613 (1984). In other words, did the parties intend title to Webb's stock to be transferred to R.O.A. upon exercise of the option, leaving executory only their respective purchase and sale obligations under the contract?[2] Or did they intend that exercise of the option would create a wholly executory contract to sell the shares, with title to remain in Webb until transferred to R.O.A. at some subsequent time?

Here, the agreement of the parties did not specify the time for transfer of legal title to Webb's shares or their actual delivery. But it did leave open for determination, after exercise of R.O.A.'s purchase option, both the purchase price and the final terms of payment, without specifying the time frame for the completion of those determinations. Thus, the parties recognized there must be further agreement on each of these terms after R.O.A.'s notice. These terms and the parties' use of the potentially lengthy appraisal process to set the price of Webb's stock compel the conclusion that they did not intend that Webb would immediately divest himself of legal ownership of the shares at the moment the option was exercised, but that he would retain legal title until some later time when these essential terms of the sale were completed. It is thus clear from the agreement itself that the parties intended legal ownership to transfer to R.O.A. at some point after notice was given, concurrent with a subsequent event, such as full payment or commencement of installment payments.[3]

This interpretation of the parties' agreement is buttressed by the uncontroverted facts that Webb pledged his stock at R.O.A.'s request even after R.O.A.'s notice of exercise of its option and, at least until June 15, R.O.A. and Reagan treated Webb as the legal owner of the shares. It is also consistent with the conclusions of other courts in cases involving similar agreements and similar inspection rights.

For example, in *Estate of Bishop v. Antilles Enters., Inc.*, 252 F.2d 498 (3rd Cir. 1958), the shareholders of the respondent corporation entered into a cross-purchase agreement providing that, upon the death of shareholder Bishop, the surviving shareholders had the option to purchase his shares from his estate at book value. Following Bishop's death, Vose, one of the surviving shareholders, asserted his right to purchase Bishop's stock from his estate. Vose claimed the stock was worthless and tendered $1.00 in payment. The district court held that the estate was entitled, as a holder of legal title, to exercise its common law right to examine the corporation's books and records. On appeal, the respondent corporation contended that "by virtue of the agreement between the stockholders, title to and ownership of Bishop's stock had passed to Vose immediately upon the election of the latter to purchase it." *Id.* at 499.

The Third Circuit Court of Appeals rejected the corporation's argument and held that, even assuming Vose's election of the option to purchase the stock vested his right to transfer of the stock upon payment of the purchase price, it did not divest the estate administrator of legal title to the shares or of the rights of a stockholder. *Id.* Moreover, the court concluded, assuming the agreement to sell the stock

was valid and binding,

> the [administrator's] right ... to have access to the books and records of the corporation certainly will continue at least until after the proper amount of the purchase price has been authoritatively determined and has been paid. Until then it is obvious that the petitioner has a very real interest in securing accurate information as to the state of the respondent corporation's accounts ....

Id.

Similarly, in *Knaebel v. Heiner*, 673 P.2d 885 (Alaska 1983), a shareholder, Knaebel, had executed a valid contract that called for the exchange of his shares (for stock in another corporation) prior to the date of his demand for inspection. Heiner, custodian of the corporation's records, refused Knaebel's written demand for inspection of the books and records under a statute extending that right to a "shareholder of record for at least six months" or a "holder of record of at least five percent of all the outstanding shares of a corporation." *Id.* at 885 & n.1. Heiner argued that, if there was a valid contract calling for the exchange of Knaebel's stock on a certain date prior to his demand for inspection, he could have no right of inspection after that date. *Id.* at 886.

On appeal, the Alaska Supreme Court rejected this argument and held that the contract was executory until the exchange of the shares actually took place. Thus, the agreement by itself did not cancel Knaebel's status as a shareholder of record for purposes of the inspection statute, "any more than a land sale contract which specifies a date for closing cancels a recorded deed on the specified date." *Id.* at 887. *See also Shelters, Inc. v. Mankin*, 130 Ga. App. 859, 204 S.E.2d 810 (1974) (executory contract to sell stock to third party did not deprive shareholder of statutory right of inspection); *Hoover v. Fox Rig & Lumber Co.*, 199 Okla. 672, 189 P.2d 929 (1948) (despite corporation's exercise of option to purchase stock, shareholder retained title as legal owner together with statutory right of inspection).

We conclude that the contract formed when the notice of exercise of option was given to Webb constituted a contract to sell the shares, with legal title remaining in Webb after that point in time. Accordingly, R.O.A.'s notice of exercise of its option pursuant to the parties' agreement did not terminate Webb's status as a shareholder of record for purposes of section 16-10-47(b). The trial court erred in ruling otherwise.

We next address briefly R.O.A.'s claim that Webb waived or contracted away his statutory right of inspection because the parties' agreement provided for an appraisal procedure to be followed after the option notice was served. Waiver is an intentional relinquishment of a known right. *Hunter v. Hunter*, 669 P.2d 430, 431 (Utah 1983). "It must be distinctly made, although it may be express or implied." *Id.* (quoting *American Savings & Loan Ass'n v. Blomquist*, 21 Utah 2d 289, 292, 445 P.2d 1, 3 (1968)). Assuming the statutory right could be contracted away consistent with public policy, R.O.A. has not identified any contract provision which either expressly or impliedly waives or modifies Webb's statutory inspection right. Indeed, Section 16 of their agreement, captioned "Rights of Ownership," states, "The Stockholders shall retain all their rights as stockholders of the Corporation, except those specifically modified by this Agreement." We conclude there was no waiver or contractual surrender of Webb's rights as a shareholder under section 16-10-47.

We turn now to the issue of statutory penalties against R.O.A. and Reagan. Utah Code Ann. §16-10-47(c) (1987) provides:

> Any officer or agent who, or a corporation which, shall refuse to allow any such shareholder, or his agent or attorney, so to examine and make extracts from its books and records of account, minutes, and record of shareholders, for any proper purpose, shall be liable to such shareholder in a penalty of 10% of the value of the shares owned by such shareholder, in addition to any other damages or remedy afforded him by law; but no such penalty shall exceed $5,000. It shall be a defense to any action for penalties under this section that the person suing therefor has within two years sold or offered for sale any list of shareholders of such corporation or any other corporation or has aided or abetted any person in procuring any list of shareholders for any such purpose, or has improperly used any information secured through any prior examination of the books and records of account, or minutes, or record of shareholders of such corporation or any other corporation, or was not acting in good faith or for a proper purpose in making his demand.

As a shareholder of record, Webb had a right to examine the corporate books pursuant to section 16-10-47(b) at a reasonable time upon written demand.[4] The statute limits the shareholder's inspection right only insofar as the requested examination must be for a "proper purpose," defined in that subsection as one "reasonably related to the person's

interest as a shareholder."

There is no question that Webb made the necessary written demands for inspection of R.O.A.'s books and records at reasonable times, i.e., during normal business hours. *See Clawson v. Clayton*, 33 Utah 266, 272, 93 P. 729, 731 (1908). Based on the undisputed facts in the record, we find that, as a matter of law, Webb's inspection requests were for a proper purpose within the meaning of the act, namely, to determine the corporation's true financial condition and thereby protect his interests as a minority shareholder in the process of selling his shares.

In their response to Webb's motion for partial summary judgment, R.O.A. and Reagan did not dispute the stated facts concerning the direct refusals of Webb's demands for inspection on three occasions. Instead, their supporting affidavits merely offered excuses which, even if true, would not establish any of the defenses to an action for penalties enumerated in section 16-10-47(c), and made conclusory allegations of bad faith without asserting any supportive facts.[5] *See Brigham Truck & Implement Co. v. Fridal*, 746 P.2d 1171, 1173 (Utah 1987); *Williams v. Melby*, 699 P.2d 723, 725 (Utah 1985).

R.O.A.'s and Reagan's repeated stall tactics, first leading Webb to believe inspection would be granted, then refusing access to the books at the agreed-upon time for specious, fluid reasons, represent exactly the type of conduct by a corporation or its officers or agents that the statute is designed to curtail through the imposition of penalties. Without sanctions to discourage the refusal of proper inspection requests, the corporation or its officers "could, by refusing access, delay inspection until the right was actually litigated." 2 *Model Business Corporation Act* §52 commentary at 129 (2d ed. 1971).

Section 16-10-47(c) clearly authorizes the imposition of a penalty for each refusal to allow inspection. Unlike the shareholders in *Meyer v. Ford Industries, Inc.*, 272 Or. 531, 538 P.2d 353 (1975), who sought the imposition of eight statutory penalties because that was the number of items they had asked to inspect, Webb made three separate and independent requests, which were separately refused. We agree with Webb that, if the statute is to have any deterrent effect, violating parties should not be permitted to purchase multiple and serial exemptions from the law's mandate for a one-time penalty fee, regardless of how often they refuse distinct, lawful shareholder demands for inspection of the corporate records.[6]

Based on the undisputed facts in the record, Reagan, as an individual, and R.O.A., as an entity, each participated in the May 27 and June 15 refusals; R.O.A., as an entity, was a participant in the June 4 refusal, while Reagan, as an individual, was not. *See generally 5A Fletcher Cyc. Corp.* §2256 (1987). Webb is, therefore, entitled to partial summary judgment against each responsible respondent in the amount of the mandatory statutory penalty for each of the three separate refusals to allow him to exercise his inspection rights as a shareholder.

Because the statute sets the amount of each penalty at ten percent of the value of the shareholder's shares plus other damages, not to exceed $5,000, and the parties' agreement dictates that the value of Webb's shares is to be determined through the appraisal process, the amount of each penalty must be fixed by the trial court on remand after the valuation is complete and Webb has been afforded an opportunity to present evidence concerning any other damages to which he is entitled.

The partial summary judgment entered in favor of respondents is reversed. The case is remanded for entry of partial summary judgment against Reagan and R.O.A., in accordance with this opinion, and for further proceedings to determine the amount of the statutory penalty to be imposed on them for each of the three separate wrongful refusals to permit inspection of the corporate books and records. In addition, the district court is directed to grant forthwith Webb's request for injunctive relief enforcing his statutory inspection right.

Norman H. Jackson, Judge

WE CONCUR:
Judith M. Billings, Judge
Gregory K. Orme, Judge

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1. The Act defines a shareholder as "one who is a holder of record of shares in a corporation." Utah Code Ann. §16-10-2(15) (1987) (redesignated as Utah Code Ann. §16-10-2(11) (1988)).

2. The issue presented in *Taylor v. Daynes*, 118 Utah 61, 218 P.2d 1069 (1950), was whether oral negotiations about the sale of stock, coupled with the parties' conduct and a written memorandum, constituted an executory contract to purchase the stock or a present purchase and sale accompanied by an immediate transfer of interest when the stock certificates were handed over to the purchaser. The trial court's finding that the parties intended a contract of immediate sale and purchase was upheld by the Utah Supreme Court as supported by the evidence at trial. *Taylor*, 218 P.2d at 1072. In an earlier case involving the interpretation of a written agreement by an employer to repurchase stock sold to an employee if the employee was discharged, the court determined that the parties had intended title to the stocks to transfer to the employer immediately upon the occurrence of the condition subsequent, i.e., the employee's discharge. *Davies v. Semloh Hotel*, 86 Utah 318, 44 P.2d 689 (1935).

3. In the context of a preliminary agreement for the sale of an apartment building, the Utah Supreme Court has stated:

> There is implied in an agreement for the sale of real estate, unless a contrary intention is expressed, that the vendor

> shall retain title until the balance of the purchase price is paid. Where there is an agreement on the part of one to convey and on the part of another to pay a definite sum, payment and conveyance are concurrent acts, unless a contrary intention appears.

Johnson v. Jones, 109 Utah 92, 164 P.2d 893, 895 (1946).

4. Any corporate agent or officer with custody or control of corporate books who refuses a bona fide shareholder's lawful demand for their inspection or copying is also guilty of a class B misdemeanor. Utah Code Ann. §76-10-708 (1978).

5. In a second affidavit filed with the trial court, Reagan sought to justify the refusals on the basis that the records Webb sought to examine were confidential. This fact alone, however, is insufficient to deny the statutory inspection right. *See Fears v. Cattlemen's Inv. Co.*, 483 P.2d 724, 730 (Okla. 1971).

6. By the same token, penalties should not be artificially compounded by identical, repetitious requests that prompt multiple, predictable refusals. Form is not to be elevated over substance in determining the number of independent requests made by a shareholder of record, each of which qualifies for a separate penalty if refused. There might be cases in which multiple "requests" would be more properly regarded as a single request repeatedly renewed. However, this is not such a case. It is clear that three separate requests were made by Webb and refused, as evidenced by the passage of time between requests and the inconsistent variety of responses. Webb's first request to examine the books and records on May 27 was denied for the express reason that only Webb's appraiser, not his accountants, was a proper agent. His June 3 inspection request, on the other hand, was denied because it would be disruptive and no staff was available to find the necessary files, which had been identified by Webb in early May. Instead, Webb was informed, the inspection would proceed on June 15, with R.O.A. staff available at that time. When Webb's agents appeared on June 15, as instructed, access to the corporate records was again refused, this time because of Webb's alleged lack of "shareholder of record" status.

Cite as
106 Utah Adv. Rep. 52

IN THE UTAH COURT OF APPEALS

STATE of Utah,
Plaintiff and Respondent,
v.
Greg Phillip CASIAS, aka Greg Phil Casias, aka John Paul Sanchez,
Defendant and Appellant.

No. 870585-CA
FILED: April 14, 1989

Third District, Summit County
Honorable Homer F. Wilkinson

ATTORNEYS:

Elliott Levine, West Valley City, for Appellant

R. Paul Van Dam and Elizabeth Holbrook, Salt Lake City, for Respondent

Before Judges Billings, Jackson, and Orme.

OPINION

BILLINGS, Judge:

Defendant Greg Phillip Casias was convicted by a jury of burglary in violation of Utah Code Ann. §76-6-202(1) (1978), and two counts of second degree theft in violation of Utah Code Ann. §76-6-404 (1978). Casias appeals from his convictions claiming the trial court erred in allowing 1) photocopies of his palm prints into evidence, and 2) the State to charge him for two counts of theft under §76-6-404, theft of a firearm, a second degree felony under §76-6-412(1)(a)(ii), and theft of property valued in excess of $1,000, a second degree felony under §76-6-412(1)(a)(i), which arose from the same criminal episode. Although we affirm Casias's convictions for burglary and one count of second degree theft, we find submitting two counts of theft to the jury and the resulting convictions thereon was error. We, therefore, remand the matter to the trial court to vacate one of the theft convictions.

FACTS

On May 14, 1987, a private residence in Summit Park, Utah, was burglarized. Items reported missing included personal property worth over $1,000 and a .25-caliber automatic pistol. During the investigation, police officers found a beer can in the bedroom of the homeowner's daughter. The beer can was sent to the state crime lab to recover latent fingerprints. The fingerprint expert at the lab recovered a left palm print and several fingerprints from the can.

On May 28, 1987, the Salt Lake County

CERTIFICATE OF MAILING

I hereby certify that I caused to be mailed a true and correct copy of the foregoing Opposition to Petition for Writ of Certiorari in the above referenced matter this 12th day of July, 1989, by mailing the same, postage prepaid, addressed to the following:

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